Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1646

WEST GULF MARITIME ASSOCIATION,
Petitioner

-versus-

FEDERAL MARITIME COMMISSION, ET AL.,
Respondent

PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS,
Intervenor

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF INTERVENOR PORT OF HOUSTON AUTHORITY IN OPPOSITION

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To The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Intervenor, Port of Houston Authority of Harris County, Texas, urges that the Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the

District of Columbia Circuit entered in the above cause be denied. All references to appendices contained herein are those appended to the Petition, pages A-1 through A-61.

OPINIONS BELOW

Petitioner's description of the Opinions Below is substantially correct.

JURISDICTION

Intervenor does not contest the jurisdiction of this Court as invoked by the Petition for Writ of Certiorari.

QUESTION PRESENTED

The Port of Houston Authority of Harris County, Texas ("Authority") is a governmental agency and body politic, a political subdivision of the State of Texas. It owns and operates the public port facilities at the Port of Houston, Texas. It is a navigation district of the State of Texas vested with all the lawful powers of such districts. For at least during the period from approximately 1933 to 1964, wharfage charges (the charges on cargo passing or conveyed over, onto, or under wharves or between vessels) due the Port of Houston Authority were billed to and collected from the vessel, its owners or agents, by the Harris County Houston Ship Channel Navigation District, the former name of the Authority. During that period, Item 3(c) of the Authority's publicly published tariff read substantially as follows:

> "All vessels and their owners receiving any commodity on a wharf or in a transit shed, or loading

> or unloading any commodity while at a wharf, hereby contracts to pay and are responsible for the wharfage on such commodities, at the rate provided herein, to be collected either from vessels, their owners or their agents." (Appendix C, p. A-27)

During that entire period wharfage charges were billed to and collected from the vessels, vessel owners or vessel agents by the Authority.

That same Item 3(c) was changed effective April 1, 1964, and until July 1, 1975 read substantially as follows:

> "Liability for wharfage charges, set forth in Item Number 65, will be the responsibility of the owner of the cargo and the Port Authority will invoice and collect from such owner or authorized agent." (Appendix C, p. A-28)

During that entire period, wharfage charges were billed to and collected from the owners of the cargo, or their representatives.

In April, 1973 the Authority, which until then had been performing as an operating terminal, loading and unloading cargoes to and from vessels and land carriers, ceased such operations. At that time the Authority advised vessel owners and agents that it contemplated a further change in its wharfage billing practices by way of reversion to tariff provisions similar to those in effect prior to April, 1964. That change was implemented, effective July 1, 1975, to revise the wording of Item 3 as follows:

> "3. Terminal Charges, set forth in Item No. 59, and Wharfage Charges, set forth in Item No. 65, are liabilities of the owners of the cargo; however,

the collection and payment of same to the Port Authority must be guaranteed by the vessel, her owners and agents, and the use of Port Authority facilities by the vessel, her owners and agents, shall be deemed an acceptance and acknowledgement of this guarantee.

3.2 As compensation to said vessel, her owners and agents, for such collection and payment of terminal and wharfage charges, as specified in Items 59 & 65, the Port Authority shall pay a fee of four per cent (4%) of the total terminal and wharfage charges incurred and billed to the vessel, her owners and agents.

3.3 Wharfage charges on cargo shall be assessed on the basis of manifest weights, unless otherwise provided herein." (Appendix C, p. A-23)

This most recent change by the Authority in its wharfage billing practices is not unique. The tariff provisions quoted last above are virtually identical to provisions of the tariff of the Port of New Orleans, Louisiana, which date back at least to a time before World War I, and probably to the creation of the port in 1896. Similar provisions, without the inclusion of a fee for collection, also appear in tariffs published by the Port of Lake Charles, Louisiana, the Port of Corpus Christi, Texas and the Port of Port Arthur, Texas since at least 1968, 1974 and 1972, respectively (Appendix C, pp. A-28, 29). The West Gulf Maritime Association (WGMA), the members of which serve one or more of the above mentioned ports in addition to the Port of Houston, filed its complaint with the Federal Maritime Commission seeking to have these most recent tariff provisions declared unjust, unreasonable, discriminatory and unlawful. The de-

cision of the Administrative Law Judge (Appendix C, p. A-20) and of the Commission (Appendix B, p. A-3) upheld the validity thereof and the United States Court of Appeals for the District of Columbia Circuit, after according the issues presented full consideration, affirmed (Appendix A, pp. A-1, 2).

The sole question presented is: (1) Whether the Federal Maritime Commission, the body having primary responsibility for the administration and enforcement of the Shipping Act of 1916 (46 U.S.C. 801, et seq.) correctly found the provisions of Intervenor's tariff to be just and reasonable regulations and practices within the terms of Section 17 of that Act (46 U.S.C. 816).

STATUTES AND REGULATIONS INVOLVED

The statement of Statutes and Regulations Involved as set out in the Petition is correct as far as it goes. The Statement is notable however for omission of the provisions of the Texas Water Code authorizing navigation districts such as Intervenor to build, own and operate facilities common to public ports, Section 60.101, and placing upon it the burden to fix charges sufficient to produce revenues to pay its expenses, Section 60.103.

STATEMENT OF THE CASE

Intervenor agrees that Petitioner's Statement substantially summarizes the case, but would respectfully show that it fails to acknowledge that tariff provisions and practices virtually identical to those complained of herein by Petitioners were in effect during a period at least from 1933 to 1964, have been in effect at the Port of New Orleans, Louisiana at least since before World War

I and probably since 1896 and are in effect now; and also are presently in effect at the Ports of Lake Charles, Louisiana, Corpus Christi, Texas and Port Arthur, Texas.

REASONS FOR DENYING THE WRIT

A.

SUGGESTION OF THE ABSENCE OF A QUESTION OF SUBSTANTIAL IMPORTANCE

Intervenor respectfully suggests that the facts and issues presented herein wholly fail to present any question of significant importance and which would be in the public interest to have decided by the Court of last resort of the United States. The essence of Petitioner's complaint is that tariff provisions virtually identical to those Petitioner's members have been abiding by at the Port of New Orleans, Louisiana since prior to World War I are unjust and unreasonable and hence proscribed by Section 17 of the Shipping Act of 1916 (46 U.S.C. 816). After full consideration, the Federal Maritime Commission, the agency primarily responsible for administration of the Act, and the Court of Appeals for the District of Columbia Circuit resolved that issue against Petitioner. The issue here presented is neither of sufficient importance nor sufficiently in the public interest, to warrant the time and attention of this Honorable Court. It is at best of interest only to the parties hereto, and the Petition should therefore be denied. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290 (1938); *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

B.

THE TARIFF PROVISIONS CHALLENGED HEREIN ARE NOT VIOLATIVE OF THE LAWS OF THE STATE OF TEXAS, THE COMMON LAW, OR OF THE SHIPPING ACT OF 1916 (46 U.S.C. 801, et seq.).

Petitioner's assertions to the contrary notwithstanding, the Federal Maritime Commission did not decide that principles of state and common law may only be given consideration as "evidence" in reaching a decision as to whether a given regulation is just and reasonable. The Commission did state, in the course of its opinion, that

> ". . . while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not *alone* dispositive of Shipping Act issues, *absent a showing that these principles directly apply to Shipping Act considerations . . .*" (emphasis added)

The Commission then found on the basis of the evidence before it that Petitioner did not demonstrate that the asserted effect of Texas or Common Law have such direct application (Appendix B, p. A-15). The Commission also fully considered the merits of Petitioner's arguments in this regard, and resolved them against Petitioner. During the course of such consideration the Commission pointed out the choice available to Petitioner between the public facilities operated by the Authority and private facilities located elsewhere at the Port of Houston. Petitioner is not confined to use of the facilities of the Authority at the Port of Houston.

In addition to the foregoing, Petitioner misstates what it offers as the applicable Texas law. Reference to the

decisions in *City of Galveston v. Kerr Steamship Company,* 362 F. Supp. 289 (S.D. Tex., 1973); aff'd. per curiam 503 F.2d 1401 (C.A. 5, 1974) cert. denied, 420 U.S. 975 (1975) and *Rorie v. The City of Galveston,* 471 S.W.2d 789 (Tex. 1971) cert. denied, 405 U.S. 988, 92 S.Ct. 1250, 31 L.Ed.2d 454 (1972), both of which are based on Texas law, reveals that both cases affirmed the imposition of unilaterally promulgated tariff terms upon parties unwilling to accept the force of law behind those provisions. Virtually the same contention Petitioner makes here was made in the *Kerr* case and at 362 F. Supp. 293, 294, the Court stated:

> "The Defendants refer to Item #5 definition of pier demurrage as 'a charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.' Defendants also point to other charges which are charged against the vessel. Defendants conclude that these definitions preclude Plaintiff from charging vessels or vessel agents with pier demurrage.
>
> "The definitions only deal with the manner in which charges are accrued. They do not purport to establish which parties are liable for the charge. Liability for the various charges is fixed by Item #30 of the tariff quoted in Finding of Fact 1. Items #5 and #30 are neither conflicting nor ambiguous."

In addition to the fact that the record reflects the practice complained of herein by Petitioner has been followed for many years at other ports on the Gulf of Mexico, the Federal Maritime Commission has previously considered similar provisions, and has found them

not to be unlawful. Shifting the responsibility for the collection and payment of such charges does not constitute an unjust and unreasonable practice within the meaning of Section 17 of the Shipping Act of 1916. *Boston Shipping Association, Inc. et al. v. Port of Boston Marine Terminal Association and Massachusetts Port Authority,* 11 F.M.C. 1 (1965) and *Boston Shipping Association, Inc., et al. v. Port of Boston Marine Terminal Association, et al.,* 10 F.M.C. 409 (1967).

Petitioner also misstates Texas law with regard to duress and business coercion. It has long been the law in Texas that duress

> ". . . cannot exist without there being a threat to do some act which the threatening party has no legal right to do—some illegal execution or some fraud or deception. The restraint must be imminent and such as to destroy free agency without present means of protection."

The foregoing is from the 1922 decision of the Texas Commission of Appeals in *Ward v. Scarborough,* 236 S.W. 434 (Tex. Com. App. 1922).

The requirements of the Statutes of Fraud are not at issue in this matter, as is demonstrated by Petitioner's Statement of the Question, at page 11 of the Petition for Writ of Certiorari where complaint is made of the tariff provision as requiring one party to answer for the debt of another. This contention was examined in depth both by the Administrative Law Judge and by the Federal Maritime Commission, and both decisions emphasized that the vessel agents in fact make arrangements for vessel berthing directly with the terminal

operator, and in so doing, incur the obligation to pay the tariff charges in question. (Appendix C, p. A-36, et seq. and Appendix B, p. A-16, 17). The Commission emphasized that the justness and reasonableness of the regulations challenged is best demonstrated by the prior course of conduct, normal business practices, and continuing and voluntary use of the facilities by the vessel agents. The Commission pointed to the prior practice between the parties of the agents having to establish independent credit arrangements with the Port Authority on behalf of their principals (Appendix B, p. A-16, 17). As the Commission pointed out, even without the prior course of conduct, agency law does not prohibit an offeror of services to the public to condition the rendering of such services to any party upon that party agreeing to be responsible for the charges for such services regardless of whether the service is sought on their own behalf or for a principal, and whether or not disclosed. It is further observed that an agreement may thereby arise outside the scope of the agent's agreement with its principal that is not controlled by agency principles. That is exactly the situation presented by Petitioner and is exactly the situation contemplated by the tariff provisions at issue which require such an agreement by an agent so utilizing the facility. *Folgner v. Italian Line,* 383 F. Supp. 816, 818 (D.C.C.Z., 1974). The agent may obtain indemnification from its principal or it may require its principal to furnish advance security (Appendix B, p. A-17). The evidence below indicates that in the vast majority of the cases advance security is in fact secured from the principal by the agent.

A valid business need has been demonstrated for the tariff provisions in question. They have been shown to

constitute just and reasonable regulations and to be fit and appropriate to the end in view. *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966); *Boston Shipping Association, Inc., et al. v. Port of Boston Marine Terminal Association and Massachusetts Port Authority,* 11 F.M.C. 1 (1965). Having determined in good faith that practical considerations warranted a change in its billing and collection practices, Intervenor, a terminal operator, must remain free to change its tariff provisions providing therefor when circumstances warrant. *Selden & Company v. Galveston Wharves,* 7 F.M.C. 679 (1964). Unilaterally promulgated tariff provisions have been examined by the courts in the past and have not been found wanting. *Rorie v. The City of Galveston,* 471 S.W.2d 789 (Tex., 1971) cert. denied, 405 U.S. 988, 92 S.Ct. 1250, 31 L.Ed.2d 454 (1972); *City of Galveston v. Kerr Steamship Company,* 362 F. Supp. 289 (S.D., Tex., 1973); aff'd. per curiam 503 F.2d 1401 (C.A. 5, 1974) cert. denied, 420 U.S. 975 (1975).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari previously filed herein should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that service of three copies of Intervenor's Brief in Opposition to the Petition for Writ of Certiorari has been made on each of the following named persons, by air mail, postage prepaid:

1. Solicitor General
   United States Department of Justice
   Washington, D. C. 20530
2. Mr. Robert Nicholson
   United States Department of Justice
   Washington, D. C. 20530
3. Mr. Edward Gruis
   Office of General Counsel
   Federal Maritime Commission
   1100 "L" Street, N. W.
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4. Mr. George H. Hearn
   Messrs. Hill, Rivkins, Carey,
   Loesberg and O'Brien
   72 Wall Street
   New York, New York 10005

Service of three copies of said document was also made on the following named person by United States Mail, postage prepaid:

5. Mr. Robert Eikel
   1442 Esperson Building
   Houston, Texas 77002

Dated at Houston, Texas this _____ day of May, 1980.

F. WILLIAM COLBURN
Attorney for Intervenor
Port of Houston Authority